Supreme Court, U.S.
FILED
DEC - 5 2006
OFFICE OF THE CLERK

No. 06-790

In The

Supreme Court of the United States

LINCOLN LOAN COMPANY, an Oregon corporation,

Petitioner,

v.

THE CITY OF PORTLAND,
a municipal corporation, and STATE OF OREGON,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Oregon

PETITION FOR WRIT OF CERTIORARI

RIDGWAY K. FOLEY, JR.
Counsel of Record
RIDGWAY K. FOLEY, JR. P.C.
GREENE & MARKLEY, P.C.
1515 S.W. Fifth Avenue, Suite 600
Portland, Oregon 97201
Telephone (503) 295-2668

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

Petitioner Lincoln Loan Company collaterally attacked the validity of an appellate judgment that reversed a trial court judgment in its favor. Petitioner alleged that the intermediate appellate court was incompetent, lacked any legal existence, and had no jurisdiction to render an appellate judgment. Without reaching the merits, the Oregon Supreme Court barred Petitioner's collateral attack by the principles of *res judicata*. Petitioner contends that adjudication by a court possessed of subject-matter jurisdiction comprises the most fundamental element of procedural due process, and that application of *res judicata* preclusive principles to sustain a void judgment of an incompetent court violates the Fifth and Fourteenth Amendments of the United States Constitution.

1. Does Due Process require an examination on the merits of the competency of a court to render a judgment before a collateral attack upon that judgment may be barred by principles of *res judicata*?

2. Does the conflict in interpretation of *Insurance Corp. v. Compagnie des Bauxites,* 456 US 694, 702, 102 S Ct 2099, 72 L Ed 2d 492 (1982) *footnote 9*, between the Second Circuit in *Town of Springfield, Vt. v. McCarren*, 549 F Supp 1134 (D Vt 1982), *affirmed* 722 F2d 728 (2nd Cir 1983), *rev den* 464 US 942, 104 S Ct 360, 78 L Ed 2d 322 (1983), and the Oregon Supreme Court in *Lincoln Loan Co. v. City of Portland*, 340 Or 613, 136 P3d 1 (2006), present an appropriate subject for grant of certiorari by this Court?

IDENTIFICATION OF PARTIES & CORPORATE DISCLOSURE STATEMENT

The parties to this action are: (1) Lincoln Loan Company, an Oregon corporation; (2) The City of Portland, Oregon, an Oregon municipal corporation; and (3), as intervenor, The State of Oregon.

Lincoln Loan Company is a private corporation wholly owned by Steven E. Benson and Melinda Benson Wilde. No parent or publicly held company owns 10% or more (or any) of the corporation's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
IDENTIFICATION OF PARTIES	ii
CORPORATE DISCLOSURE STATEMENT	ii
CITATIONS TO REPORTS BELOW	1
JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
1. Federal Question Preserved Below	4
2. Additional Statement of Facts	6
ARGUMENT IN SUPPORT OF ISSUANCE OF WRIT	8
1. Purported Judgments Rendered by Incompetent Courts Are Nullities, And Absent Reversal Deprive Parties of Fundamental Procedural Due Process	8
2. The Need For Clarification Of A Conflict By This Court: Does *Res Judicata* Bar Collateral Attack Upon Void Judgments?	12
3. This Court Should Grant Certiorari To Clarify The Law of Void Judgments In The Context of Subject-Matter Jurisdiction	21
CONCLUSION	24

TABLE OF CONTENTS – Continued

Page

APPENDICES:

Oregon Supreme Court Opinion in *Lincoln Loan Co. v. City of Portland*, 340 Or 613, 136 P3d 1 (2006) ..... App. 1

Oregon Supreme Court Appellate Judgment and Supplemental Judgment, filed 5/25/06, effective date 10/13/2006 ..... App. 23

Oregon Circuit Court General Judgment and Money Award, filed 4/7/04, entered date 4/14/2004 ..... App. 26

Oregon Circuit Court Supplemental Judgment, filed 4/28/04, entered date 5/5/2004 ..... App. 29

Oregon Circuit Court Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendant's Motion for Summary Judgment, filed 3/19/04, entered 4/5/2004 ..... App. 31

Oregon Supreme Court Order Denying Petition for Reconsideration, dated 9/6/2006 ..... App. 34

TABLE OF AUTHORITIES

Page

CASES CITED

ACLI Government Securities, Inc., v. Rhoades, 764 F2d 1033 (4th Cir 1985) 25

Armatta v. Kitzhaber, 327 Or 250, 959 P2d 49 (1998) 7

Beiser v. Weyler, 284 F3d 665 (5th Cir 2002) 25

Board of Electric Light Comm. v. McCarren, 725 F2d 176 (2nd Cir 1983) 25

Burnham v. Superior Court of Cal., Marin County, 495 US 604, 110 S Ct 2105, 109 L Ed 2d 631 (1990) 9

Chicot County Dist. v. Bank, 308 US 371, 60 S Ct 317, 84 L Ed 329, *reh den* 309 US 695, 60 S Ct 581, 84 L Ed 1035 (1940) ..... *passim*

City of South Pasadena v. Mineta, 284 F3d 1154 (9th Cir 2002) 26

Corbett v. MacDonald, 124 F3d 82 (2nd Cir 1996) 25

Donovan v. Mazzola, 761 F2d 1411 (9th Cir 1985) 26

Durfee v. Duke, 375 US 106, 84 S Ct 242, 11 L Ed 2d 186 (1963) 16, 17

Fay v. Noia, 372 US 391, 83 S Ct 822, 9 L Ed 2d 837 (1963), *overruled in part, other grounds, Wainwright v. Sykes*, 433 US 72, 97 S Ct 2497, 53 L Ed 2d 594, *reh den* 434 US 880, 98 S Ct 241, 54 L Ed 2d 163 (1977) 16

Fletcher v. City of Paducah, 911 F2d 732 (6th Cir 1990) 25

Forsyth v. Hammond, 166 US 506, 17 S Ct 665, 41 L Ed 1095 (1897) 13

TABLE OF AUTHORITIES – Continued

Page

Freytag v. Commissioner, 501 US 868, 111 S Ct 2631, 115 L Ed 2d 764 (1991) 23

Glidden Co. v. Zdanok, 370 US 530, 82 S Ct 1459, 8 L Ed 2d 671, *reh den* 371 US 854, 83 S Ct 14, 9 L Ed 2d 93 (1962) 18

Hamdan v. Rumsfeld, 548 US ___, 126 S Ct 2749, 165 L Ed 2d 723 (2006) 10

Hudson v. Guestier, 10 US (6 Cranch) 281, 3 L Ed 224 (1810) 9

INS v. Chadha, 462 US 919, 103 S Ct 2764, 77 L Ed 2d 317 (1983) 11

Insurance Corp. v. Compagnie des Bauxites, 456 US 694, 102 S Ct 2099, 72 L Ed 2d 377 (1982) 8, 12, 24

In re Ivory, 70 F3d 73 (9th Cir 1995) 26

In re Jones, 804 F2d 1133 (10th Cir 1986) 26

Kalb v. Feuerstein, 308 US 433, 60 S Ct 343, 84 L Ed 370 (1940) ..... *passim*

Kansas City Southern Ry. Co. v. Great Lakes Carbon, 624 F2d 822, *cert den* 449 US 955, 202 S Ct 363, 66 L Ed 2d 220 (8th Cir 1980) 21

Lincoln Loan Co. v. City of Portland, 340 Or 613, 136 P3d 1 (2006) ..... *passim*

Lincoln Loan Co. v. City of Portland, 341 Or 4, ___ P3d ___ (2006) 2

Lincoln Loan Co. v. City of Portland, 158 Or App 574, 976 P2d 60 (1999), *rev den* 330 Or 138, 6 P3d 1098 (2000), *cert den Lincoln Loan Company v. City of Portland*, 531 US 1013, 121 S Ct 570, 148 L Ed 2d 488 (2000) 2, 6

TABLE OF AUTHORITIES – Continued

Page

Lubben v. Selective Service Sys. Local Board No. 27, 453 F2d 645 (1st Cir 1972) 21

Miehl v. Greyhound Lines, Inc., 23 Fed Appx 611 (8th Cir 2001) 26

Ex parte Milligan, 71 US (4 Wall) 2, 18 L Ed 281 (1866) 10

Nemaizer v. Baker, 793 F2d 58 (2nd Cir 1986) 21

O'Rourke Bros. Inc. v. Nesbitt Burns, Inc., 201 F3d 948 (7th Cir 2000) 21

Pennoyer v. Neff, 95 US (5 Otto) 714, 24 L Ed 565 (1877) 10

Picco v. Global Marine Drilling Co., 900 F2d 846 (5th Cir 1990) 25

Pratt v. Ventas, Inc., 365 F3d 514 (6th Cir 2004) 25

Reid v. Covert, 354 US 1, 77 S Ct 1222, 1 L Ed 2d 1148 (1957) 13, 16, 17, 18, 19

Republic Supply Co. v. Shoaf, 815 F2d 1046 (5th Cir 1987) 25

Rose v. Himely, 8 US (4 Cranch) 241, 2 L Ed 2d 1148 (1957) 9

Royal Insurance Co. v. Quinn-L Corp., 960 F2d 1286, *reh den* 966 F2d 674 (5th Cir 1992) 25

Ruhrgas AG v. Marathon Oil Co., 526 US 574, 119 S Ct 1563, 143 L Ed 2d 760 (1999) 22

Shaffer v. Heitner, 433 US 186, 97 S Ct 2569, 53 L Ed 2d 683 (1977) 10

Steel Co. v. Citizens for a Better Environment, 523 US 83, 118 S Ct 1003, 140 L Ed 2d 210 (1998) 22

TABLE OF AUTHORITIES – Continued

Page

Steven D. Thompson Trucking v. Dorsey Trailers, 870 F2d 1044, *reh den* 880 F2d 818 (5th Cir 1989) 10

Stoll v. Gottlieb, 305 US 165, 59 S Ct 134, 83 L Ed 104, *reh den* 305 US 675, 59 S Ct 250, 83 L Ed 437 (1938) ..... *passim*

Town of Springfield, Vt. v. McCarren, 549 F Supp 1134 (D Vt 1982), *affirmed* 722 F2d 728 (2nd Cir 1983) 19, 20, 22

United States v. Carolene Products Co., 304 US 144, 58 S Ct 778, 82 L Ed 1234 (1938) 12

United States v. County of Cook, Illinois, 167 F3d 381, *cert den sub nom US v. Cook County*, 528 US 1019, 120 S Ct 527, 145 L Ed 2d 408 (7th Cir 1999) 26

United States v. Dailide, 316 F3d 611, *cert den sub nom Dailide v. United States*, 540 US 876, 124 S Ct 263, 157 L Ed 2d 138 (6th Cir 2003) 25

United States v. Dixon, 509 US 688, 113 S Ct 2849, 125 L Ed 2d 556 (1993) 12

United States v. Matta-Ballesteros, 71 F3d 754 (9th Cir 1995), *op amended, other grounds, reh den*, 98 F3d 1100 (1996), *cert den sub nom Matta-Ballesteros v. United States*, 519 US 1118, 117 S Ct 965, 136 L Ed 2d 850 (1997) 26

United States v. Tittjung, 235 F3d 330 (7th Cir 2000), *cert den* 533 US 931, 121 S Ct 2554, 150 L Ed 2d 721 (2001) 21

United States v. U. S. Fidelity Co., 309 US 506, 60 S Ct 653, 84 L Ed 894 (1940) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

United States v. Van Cauwenberghe, 934 F2d 1048 (9th Cir 1991) .....

United States ex rel. Wilson v. Walker, 109 US 258, 3 S Ct 277, 27 L Ed 927 (1883) 9

Williams v. United States, 289 US 553, 53 S Ct 751, 77 L Ed 1372 (1933) 18

CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. § 1983 6

Oregon Constitution, Article VII (amended) 5, 7, 11

Oregon Constitution, Article XVII 7

U.S. Const. Article I, § 8 17

U.S. Const. amend. V 3, 11, 19

U.S. Const. amend. XIV, § 1 .....3, 11, 19

Uniform Code of Military Justice, Article 2(11) 16

PETITION FOR WRIT OF CERTIORARI

Petitioner Lincoln Loan Company, an Oregon corporation (Petitioner or Lincoln), respectfully prays that a writ of certiorari issue to review the judgment and supplemental judgment of the Supreme Court of the State of Oregon. Those judgments affirmed the trial court, denied Petitioner's prayer for a declaration that the Oregon Court of Appeals is not a valid court and that it never possessed any judicial subject-matter jurisdiction, and denied Petitioner's Petition For Reconsideration challenging the Oregon Supreme Court's use of the claim preclusion principles of *res judicata* to avoid deciding whether the Oregon Court of Appeals had any judicial subject-matter jurisdiction. Specifically and ultimately, Petitioner seeks reinstatement of the trial court jury verdict in an earlier case, awarding it $2,700,000 damages and an injunction against Respondent City of Portland for violation of Petitioner's constitutional rights to equal protection of the laws and due process.

CITATION TO REPORTS BELOW

The Circuit Court of the State of Oregon for the County of Multnomah entered General and Supplemental Judgments denying Petitioner's action for declaration of the status of the Oregon Court of Appeals (App. 26 to App. 30). These judgments are not officially or unofficially reported. Because this case challenged the existence and judicial subject-matter jurisdiction of the Oregon Court of Appeals, the Oregon Supreme Court heard and decided Petitioner's Appeal. The Oregon Supreme Court decision is reported as *Lincoln Loan Co. v. City of Portland*, 340 Or 613, 136 P3d 1 (2006). That decision is appended (App. 1

to App. 22). Petitioner filed its Petition For Reconsideration Of Petitioner Lincoln Loan Company in full compliance with Oregon law, challenging the Oregon Supreme Court's use of preclusive principles of *res judicata* to affirm the trial court and avoid deciding the merits of Petitioner's claim that the Oregon Court of Appeals lacked subject-matter jurisdiction. The Oregon Supreme Court issued its Order Denying Petition For Reconsideration on September 6, 2006 (App. 34). That Order is reported only by notation as *Lincoln Loan Co. v. City of Portland*, 341 Or 4, ___ P3d ___ (2006).

The present case collaterally attacks an Appellate Judgment in the underlying case of *Lincoln Loan Co. v. City of Portland*, 158 Or App 574, 976 P2d 60 (1999), *rev den* 330 Or 138, 6 P3d 1098 (2000), *cert den Lincoln Loan Company v. City of Portland*, 531 US 1013, 121 S Ct 570, 148 L Ed 2d 488 (2000).

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Oregon Supreme Court denied Petitioner's claim for declaratory relief by its opinion of May 25, 2006 (App. 1 to App. 22). Petitioner filed its timely Petition For Reconsideration in full compliance with Oregon law on July 27, 2006, challenging the use of *res judicata* principles to avoid the merits of Lincoln's claim that the Oregon Court of Appeals lacks any judicial subject-matter jurisdiction. The Oregon Supreme Court issued its Order Denying Petition For Reconsideration on September 6, 2006 (App. 34). The Oregon Supreme Court issued its Appellate Judgment and Supplemental Judgment effective October

13, 2006 (App. 23 to App. 25). Lincoln's Petition for Writ of Certiorari is timely because it is filed within 90 days of the Supreme Court Order Denying Petition For Reconsideration and entry of the Appellate Judgment and Supplemental Judgment. 28 U.S.C. § 2101(c). This Court has jurisdiction to review the judgment of the Oregon Supreme Court on Writ of Certiorari pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition implicates Amendment V of the Constitution of the United States of America:

When prosecution to be by presentment or indictment; double jeopardy; self-incrimination; due process; compensation for property taken for public use. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

It also implicates Amendment XIV, Section 1, of the Constitution of the United States of America:

Section 1. **Citizenship; privileges and immunities; due process; equal protection.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and

of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Federal Question Preserved Below

The Oregon Supreme Court methodology changed the focus of this appeal and created the federal question, although the essential federal issue always existed. That issue is, may a non-court issue and enforce a valid judgment in the absence of subject-matter jurisdiction and still comport with fundamental due process?

Petitioner sought a judicial declaration that the Oregon Court of Appeals lacks legal existence and judicial subject-matter jurisdiction. *Lincoln Loan*, 340 Or at 615 (App. 2). The trial court summary judgment held that Petitioner lacked standing and was barred by a statute of limitations (App. 31 to App. 33). Petitioner's initial Supreme Court briefing established several essential elements: (1) a purported appellate judgment issued in the absence of subject-matter jurisdiction is void for all time and for all purposes (App. Br. 29)[1]; (2) a valid amendment to the Oregon Constitution requires strict compliance with

[1] "App. Br." refers to Petitioner's Opening Appellant's Brief in the Oregon Supreme Court; "Rep." refers to Petitioner's Reply Brief in the Oregon Supreme Court; "Pet." refers to Petitioner's Petition For Reconsideration to the Oregon Supreme Court.

all constitutionally-prescribed procedures (App. Br. 4, 9); (3) the 1910 amendments proposing Oregon Constitution Article VII (Amended) did not comply with all constitutional commands (App. Br. 4, 10-28); (4) the statutes purporting to create the Oregon Court of Appeals were enacted under the authority of Article VII (Amended) and therefore were void from the outset (App. Br. 4, 8-9, 30-31).

Although preclusion formed only one of several affirmative attacks by Respondent and Intervenor, Petitioner also argued that theories of preclusion cannot validate unconstitutional acts (App. Br. 4-5). Under the heading, "The Fundamental Nature Of Subject Matter Jurisdiction Renders Preclusive Theories Inappropriate And Inapplicable" (App. Br. 34), Lincoln presented an extended argument supporting the fundamental position presented to this Court (App. Br. 34-43). It expanded this analysis and argument in its Reply Brief (Rep. 16-20) under the heading "7. Theories Of Limitation And Preclusion Do Not Apply To This Case" (Rep. 16).

The Oregon Supreme Court affirmed the trial court on grounds different from the trial court. It held that *res judicata* precluded Lincoln's collateral attack. By that holding it avoided consideration of the merits of Lincoln's claim that the Oregon Court of Appeals' putative judgment was void for lack of subject-matter jurisdiction. *Id.*, 340 Or at 616-30 (App. 3 to App. 22). By this device, the state court changed and narrowed the focus of Petitioner's appeal.

In response to this changed focus, and recognizing that by purporting to avoid a decision on the merits the Oregon Supreme Court essentially validated a void judgment and deprived Petitioner of a valuable property right,

Petitioner filed a detailed Petition for Reconsideration setting forth the essential argument now presented to this Court. As before, it stressed the institutional nature of the concept of subject-matter jurisdiction, the judicial obligation to enforce limits upon judicial jurisdiction, the separation-of-powers fundamental involved in jurisdictional concepts, and like analysis. It urged that judgments void for lack of subject-matter jurisdiction are always subject to collateral attack. Virtually all 29 pages of Lincoln's Petition for Reconsideration analyzed and argued the elemental position now presented to this Court.

2. Additional Statement of Facts

Lincoln obtained a state court judgment against the City of Portland, Oregon awarding damages of $2.7 million and injunctive relief under a 42 U.S.C. § 1983 claim for violations of its civil rights to substantive due process and equal protection of the laws. Respondent appealed to the Oregon Court of Appeals, which overturned that judgment. The issue of the lawful existence and subject-matter jurisdiction of the Oregon Court of Appeals was not raised in the appeal before it, nor in Lincoln's Petition for Review to the Oregon Supreme Court, nor in its Petition for a Writ of Certiorari to this Court, *Lincoln Loan Company v. City of Portland*, 531 US 1013, 121 S Ct 570, 148 L Ed 2d 488 (2000).

Subsequently, Petitioner commenced the present action seeking a declaration that the appellate judgment of the Oregon Court of Appeals was void because that court was unconstitutionally created, did not lawfully exist, and lacked any jurisdiction. The trial court evidence showed that the Oregon Constitution vested the judicial

power of the State of Oregon in designated courts which did not include an intermediate court of appeals; the constitution limited the power of the Oregon legislature to the creation of municipal courts and investment of justices of the peace with limited judicial powers; and the constitution placed all appellate judicial jurisdiction in the Oregon Supreme Court.

Further, the record shows that in 1969 the Oregon legislature purported to establish an Oregon Court of Appeals with almost exclusive initial jurisdiction over all appeals. The legislature purported to act under the authority of Oregon Constitution Article VII (Amended), derived from an initiative proposal to amend the Oregon Constitution approved by Oregon voters in 1910. At trial, the evidence demonstrated that Article VII (Amended) had not been adopted in compliance with the requirements for amending the Oregon Constitution set out in Article XVII. In particular, the 1910 initiative to amend Article VII would have made multiple and unrelated changes to the Oregon Constitution, each of which constituted a separate amendment. The Oregon Constitution requires that every proposed amendment must be voted upon and approved separately by the electors. The Oregon Supreme Court has interpreted this "separate-vote" requirement strictly, and has declared repeatedly that every proposed amendment to the Oregon Constitution that violates this requirement is void. *E.g., Armatta v. Kitzhaber*, 327 Or 250, 959 P2d 49 (1998). Hence, since the 1910 initiative to amend Article VII violated the "separate-vote" requirement, it was void. As a result, the Oregon legislature had no authority to create the Oregon Court of Appeals or to vest it with any appellate jurisdiction.

The trial court held that Petitioner had filed its challenge to the 1910 initiative too late to comply with any applicable statute of limitations, and that it lacked standing to challenge the 1910 initiative. *Lincoln Loan*, 340 Or at 616. On review, the Oregon Supreme Court declared that " * * * the voters, the legislature, this court, and the Governor all have assumed, and acted for decades on the assumption, that Article VII (Amended) became a valid part of the Oregon Constitution in 1910." *Id.*, 340 Or at 629. As a result, that court considered it unnecessary to reach the merits of Petitioner's argument that Article VII (Amended) was void and that the Court of Appeals "does not lawfully exist." *Id.*, 340 Or at 628-29. Relying in substantial part on this Court's decisions in *Stoll v. Gottlieb*, 305 US 165, 59 S Ct 134, 83 L Ed 104, *reh den* 305 US 675, 59 S Ct 250, 83 L Ed 437 (1938), *Chicot County Dist. v. Bank*, 308 US 371, 60 S Ct 317, 84 L Ed 329, *reh den* 309 US 695, 60 S Ct 581, 84 L Ed 1035 (1940), and *Insurance Corp. v. Compagnie des Bauxites*, 456 US 694, 702 n. 9 (1982), the Oregon Supreme Court barred Petitioner's collateral attack on the Appellate Judgment of the Oregon Court of Appeals by the preclusive principles of *res judicata*. *Lincoln Loan*, 340 Or at 630.

ARGUMENT IN SUPPORT OF ISSUANCE OF WRIT

1. Purported Judgments Rendered By Incompetent Courts Are Nullities, And Absent Reversal Deprive Parties Of Fundamental Procedural Due Process

Lincoln's collateral attack alleged that the Appellate Judgment of the Oregon Court of Appeals was void because the court's purported creation was unconstitutional;

thus, it lacked any judicial jurisdiction and was incompetent to render any appellate judgment, including one that reversed Petitioner's trial court judgment. Lincoln did not allege that the Court of Appeals had merely made an error in the exercise of judicial power; rather, it alleged that the court was a pretend court that lacked ***any jurisdiction*** at all. In other words, this pretend court lacked even the jurisdiction to determine its own jurisdiction.

In order to render a judgment, a court must be vested with some portion of the judicial authority or power of the state; otherwise, the proceeding is not a ***judicial*** proceeding, does not comport with ***fundamental due process***, and cannot yield a ***judgment***. *Burnham v. Superior Court of Cal., Marin County*, 495 US 604, 608-9, 110 S Ct 2105, 2109, 109 L Ed 2d 631 (1990). The "judgment" of a tribunal lacking judicial authority or power is a nullity having no legal effect whatever. *Rose v. Himely*, 8 US (4 Cranch) 241, 269, 2 L Ed 608 (1808).[2] A judgment is forever void if the rendering court lacks the power to enter it; that is, if the court entered a decree "not within the powers granted to it by the law." *United States ex rel. Wilson v. Walker*, 109 US 258, 266, 3 S Ct 277, 27 L Ed 927 (1883).

The source of all judicial jurisdiction is found in the constitution and laws enacted in compliance with the constitution. Unlike the United States Constitution, Article VII of the Oregon Constitution does not grant power to the legislative branch to create courts inferior to the Supreme Court; rather, the Oregon Constitution restricts legislative power to investing justices of the peace

---

[2] *Overruled, other grounds, Hudson v. Guestier*, 10 US (6 Cranch) 281, 3 L Ed 224 (1810).

with limited judicial powers and to creating municipal courts. The Oregon Constitution vests the judicial jurisdiction of the State in specific courts, not including an intermediate court of appeals. Thus, the Oregon Constitution prohibits the Oregon Legislative Assembly from creating an Oregon Court of Appeals or vesting it with any judicial jurisdiction.

The Oregon Supreme Court did not reach the merits of Petitioner's collateral attack contending that the Oregon Court of Appeals does not lawfully exist. Instead, it barred Petitioner's action by the doctrine of claim preclusion, its preferred term for *res judicata*. In doing so, the Oregon Supreme Court failed to recognize that this preclusive doctrine does not apply to the judgment of an incompetent court. *See, e.g., Steven D. Thompson Trucking v. Dorsey Trailers*, 870 F2d 1044, 1045, *reh den* 880 F2d 818 (5th Cir 1989) (setting out elements of *res judicata*).

Judicial competence differs from jurisdiction. To invest any proceeding with validity within the fundamental confines of due process, that proceeding must take place before a tribunal competent by its constitution – that is, by the law of its creation – to hear and determine the matter before it. *Pennoyer v. Neff*, 95 US (5 Otto) 714, 733, 24 L Ed 565 (1877).[3] A tribunal that is organized pursuant to an unconstitutional law is incompetent and possesses no jurisdiction to decide a case or controversy; it cannot render a valid judgment. *Ex parte Milligan*, 71 US (4 Wall) 2, 121-22, 18 L Ed 281 (1866); *Hamdan v. Rumsfeld*, 548 US ___, 126 S Ct 2749, 165 L Ed 2d 723 (2006). Absent a

[3] *Overruled in part, other grounds, Shaffer v. Heitner*, 433 US 186, 97 S Ct 2569, 53 L Ed 2d 683 (1977).

valid judgment, nothing exists to which the doctrine of *res judicata* can apply or attach. Thus, in the context of a collateral attack, the first and fundamental question that must be asked is whether the challenged judgment was rendered by a competent court.

The Oregon Supreme Court acknowledged Petitioner's contention that "the legislature had no authority to create the Court of Appeals, and that court therefore is a 'pretend' or 'non-existent' court," and that "the constitutional provision that the legislature relied upon in establishing that court is invalid." *Lincoln Loan*, 340 Or at 620, 628. "Whatever the merits of plaintiff's claim * * * " the court said, " * * * we need not, and do not, decide in this case * * * " *Id.*, 340 Or at 629. By way of explanation, the court stated that voters and public officials had assumed for many years that Article VII (Amended) was valid. *Id.* This observation is irrelevant in that it ignores the fact that an invalid amendment that has been assumed to be valid, and even relied upon, over an extended period of time, does not thereby have its defects cured and become constitutional. *INS v. Chadha*, 462 US 919, 103 S Ct 2764, 77 L Ed 2d 317 (1983). Thus, the Oregon Supreme Court explanation fails to demonstrate that the Oregon legislature possessed any constitutional authority to create an intermediate court of appeals, or that the Oregon Court of Appeals is a competent court having judicial authority or power to decide any matter brought before it or to render a valid judgment. The purported judgments of incompetent courts are nullities. Lincoln has been denied relief from a void judgment and, by this denial, has been deprived of a valuable property right, as well as its fundamental right to the process due under the Fifth and Fourteenth Amendments.

2. The Need For Clarification Of A Conflict By This Court: Does *Res Judicata* Bar Collateral Attack Upon Void Judgments?

Footnotes in legal opinions sometimes cause much mischief and confusion in the law. Opinions set forth in footnotes are often pure *dictum*. Several cases down the line, however, that *dictum* may be cited by the court and, as if by magic, be transformed into precedent. Take, for example, footnote four of *United States v. Carolene Products Co.*, 304 US 144, 152-153, 58 S Ct 778, 82 L Ed 1234 (1938) (announcing what became known as the "strict scrutiny" test for laws challenged as violations of the Bill of Rights). On the other hand, *United States v. Dixon*, 509 US 688, 113 S Ct 2849, 125 L Ed 2d 556 (1993), observes that multiple quotations of suspect *dictum* cannot convert *dictum* into case law. Except, of course, when it does.

This case involves such a footnote. In 1982, this Court appeared to declare that relief from void judgments could ***not*** be obtained by collateral attacks upon grounds of defective jurisdiction. In *Insurance Corp.*, 456 US 694, 702, n. 9 [footnote nine], this Court remarked:

> A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations – both subject matter and personal. See *Chicot County Drainage Dist. v. Baxter State Bank*, 308 US 371, 60 S Ct 317, 84 L Ed 329 (1940); *Stoll v. Gottlieb*, 305 US 165, 59 S Ct 134, 83 L Ed 104 (1938).

Footnote nine is pure *dictum*, having nothing to do with the issue being decided in the case, which involved a

finding of personal jurisdiction as a sanction for failure to comply with discovery orders. Since 1982, however, footnote nine has been cited as authority in nearly every federal circuit. *See* Endnote.

One of the problems with footnote nine is that it does not accurately summarize the law set forth in *Chicot County* and *Stoll*. For instance, both of these cases take care to apply the bar of *res judicata* only to the judgments of ***competent courts*** lawfully established and vested with some valid (if limited) measure of jurisdiction. *Chicot County*, 308 US at 376 ("The lower federal courts are all courts of limited jurisdiction * * * But none the less they are ***courts with authority*** * * * .") [Emphasis added]; *Stoll*, 305 US at 173 ("Having litigated a question in one ***competent tribunal*** and been defeated, can she litigate the same question in another tribunal, * * * ." [*Quoting Forsyth v. Hammond*, 166 US 506, 17 S Ct 665, 41 L Ed 1095 (1897)]. [Emphasis added].

Ambiguity also plagues footnote nine. One cannot discern if it announces an absolute bar on all collateral attacks, or if it merely comprises a general rule subject to exceptions. The plain text does not suggest a rule subject to exceptions. However, to read footnote nine as an absolute bar ignores the facts and language of *Chicot County* and *Stoll*, as well as this Court's subsequent decisions allowing collateral attacks for lack of subject-matter jurisdiction in *Kalb v. Feuerstein*, 308 US 433, 60 S Ct 343, 84 L Ed 370 (1940), *United States v. U. S. Fidelity Co.*, 309 US 506, 60 S Ct 653, 84 L Ed 894 (1940) [*Fidelity*], and *Reid v. Covert*, 354 US 1, 77 S Ct 1222, 1 L Ed 2d 1148 (1957).

Neither *Stoll* nor *Chicot County* involved alleged jurisdictional errors of constitutional magnitude. In *Stoll*, 305 US at 171, this Court took care to point out that its ruling did not involve subject-matter jurisdictional issues that raised separation of powers concerns, commenting "[a] court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators." In other words, no court can ever exceed the constitutional limits on its jurisdiction. Having excluded this limited sense of jurisdiction from its consideration, this Court proceeded to decide that courts must have the power to determine such things as "whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the occurrence under consideration." *Id.* If a court misconstrues these non-constitutional issues, it merely makes an "erroneous" decision that "does not in any proper sense enlarge the jurisdiction of the court * * * ." *Id.*, 305 US at 172. Thus, *Stoll* clearly does not apply to instances where courts lacking subject-matter jurisdiction attempt to pronounce judgments that *would* enlarge their jurisdiction beyond constitutional limits. Rather, *Stoll* expressly recognizes that cases involving constitutional separation of powers and usurpation of power issues reside outside the announced rule of *res judicata*.

Chicot County, like *Stoll*, did not involve any constitutional issue. It simply considered whether a District Court, sitting as a bankruptcy court, lacked *statutory* authority to decide an issue. *Chicot County*, 308 US at 376. It did not involve basic constitutional protections or separation of power concerns. Also like *Stoll*, *Chicot County* reined in the improper use of the essential subject-matter doctrine

and limited it to keeping courts within constitutional bounds.

Unlike *Stoll* and *Chicot County, Kalb* involved a successful collateral attack upon the purported judgment of a court lacking subject-matter jurisdiction. It supports the understanding that *Stoll* and *Chicot County* only limit the availability of collateral attacks on void judgments, and does not abolish them. *Kalb* admonished, "It is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is not thereafter subject to collateral attack." *Id.*, 308 US at 438, citing *Stoll* and *Chicot County* as authority for this general rule.

However, the *Kalb* Court proceeded to explain that exceptions exist to this presumptive rule of regularity, declaring that when a court acts beyond its power, its judgment is *void and subject to collateral attack*. *Id.*, 308 US at 438-39. It is significant and essential to observe that this Court decided *Chicot County* and *Kalb* unanimously and on the same day. One must conclude that this Court intended the rule announced in *Chicot County* to be read in conjunction with the exception explained in *Kalb*, and that these admonitions are inseparable.

Fidelity, 309 US 506, provides additional evidence that it is a mistake to read footnote nine as an absolute bar to collateral attacks on void judgments. This decision, rendered less than three months after *Chicot County* and by the same unanimous court,[4] explained that the *Chicot County* holding was limited in its scope, and that "*no*

[4] Mr. Justice McReynolds took no part in *Fidelity*. 309 US at 516.

inflexible rule as to collateral objection in general to judgments was declared." Id., 309 US at 514 [emphasis added]. Although *Chicot County* "definitely extended the area of adjudications that may not be the subject of collateral attack," there exist "numerous groups of judgments" whose susceptibility to such attacks have not been examined. *Id.* The Court then held that one such group, cases involving the doctrine of sovereign immunity, similar to the bankruptcy cases in *Kalb*, were also exempt from the general rule of presumptive regularity.

In 1957, this Court again permitted a collateral attack in *Reid v. Covert*, 354 US 1, 77 S Ct 1222, 1 L Ed 2d 1148 (1957). *Reid* involved a civilian tried for murder by court-martial, found guilty, and sentenced to life imprisonment. The Army Board of Review and the Court of Military Appeals approved that judgment. Subsequently, the civilian filed a petition for habeas corpus,[5] alleging that the court-martial took place without subject-matter jurisdiction because the Uniform Code of Military Justice, Article 2(11) (authorizing trial of civilian dependents) was unconstitutional.

This Court revisited the issue of collateral attacks on judgments in *Durfee v. Duke*, 375 US 106, 84 S Ct 242, 11 L Ed 2d 186 (1963). Confronted with the question whether a judgment of a Nebraska court was binding on a Missouri court (more specifically, whether Nebraska's finding of jurisdiction could be attacked collaterally), this Court

---

[5] Habeas Corpus "is really but an instance of the larger principle that void judgments may be collaterally impeached." *Fay v. Noia*, 372 US 391, 423, 83 S Ct 822, 9 L Ed 2d 837 (1963), *overruled in part, other grounds, Wainwright v. Sykes*, 433 US 72, 97 S Ct 2497, 53 L Ed 2d 594, *reh den* 434 US 880, [illegible] S Ct 241, 54 L Ed 2d 163 (1977).

observed that "the modern decisions of this Court have carefully delineated the permissible scope of such an inquiry." *Id.*, 375 US at 111.The Court thereafter explained the general rule of *res judicata* and noted this general rule applies to issues of subject-matter jurisdiction (citing *Stoll* among the authorities supporting this proposition). *Id.*, 375 US at 111-12. Tellingly, the *Durfee* Court repeated the admonition that "the general rule of finality of jurisdictional determinations *is not without exceptions*," and cited *Kalb* and *Fidelity*. *Id.*, 375 US at 114 [emphasis added].

In sharp contrast to *Stoll* and *Chicot County*, the *Kalb, Fidelity* and *Reid* cases each involve a judgment that was found void and subject to collateral attack because a lower court acted beyond the constitutional limits of its authority. In *Kalb*, for example, state law invested the state court with jurisdiction over foreclosures. However, the United States Constitution, Article I, § 8, clause 4 gives Congress exclusive power to regulate bankruptcy. Since Congress had vested exclusive jurisdiction over bankrupt farmers in federal bankruptcy courts, state courts were divested of all power to maintain foreclosure suits against those farmers. This Court explained that "[s]tates cannot, * * * , vest State courts with power to violate the supreme law of the land." *Id.*, 308 US at 439. Because the action of the state court "was not merely erroneous but was beyond its power, * * * " (*i.e.*, the state court lacked subject-matter jurisdiction because state statutes purporting to grant it authority over bankrupt farmers were unconstitutional), its foreclosure decree was void and subject to collateral attack. *Id.*, 308 US at 438-39.

Fidelity involved two Indian nations on whose behalf the United States filed a claim in bankruptcy court. The receiver denied liability and counterclaimed. The bankruptcy

court found in favor of the receiver. Instead of appealing this adverse judgment, the United States brought suit for its claims in another district. The receiver intervened and pled his bankruptcy judgment. This Court held that the failure of the United States to object or appeal from the award in the bankruptcy court was not fatal, since:

> " * * * the suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. * * * Absent that consent, the attempted exercise of judicial power is void. * * * *Chicot County Drainage District v. Baxter State Bank* is inapplicable where the issue is the waiver of immunity." *Id.*, 309 US at 514 (footnotes omitted).

While the Constitution does not explicitly mention sovereign immunity, the concept that "the sovereign power is immune from suit" was settled and understood at the time of the Constitutional Convention. *Williams v. United States*, 289 US 553, 573, 53 S Ct 751, 757, 77 L Ed 1372 (1933). In this sense, the Framers did not intend the Article III extension of judicial competence over cases and controversies to include jurisdiction over actions where the sovereign is named as a defendant. *Glidden Co. v. Zdanok*, 370 US 530, 564, 82 S Ct 1459, 1480, 8 L Ed 2d 671, *reh den* 371 US 854, 83 S Ct 14, 9 L Ed 2d 93 (1962). All courts lack subject-matter jurisdiction over suits against sovereign defendants because such suits are excluded from the "case and controversy" provision of Article III.

In *Reid*, this Court held that Congress lacked authority to extend military jurisdiction to civilians. Such an extension formed "an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and other treasured constitutional

protections" contained in Article III, section 2, and the Fifth and Sixth Amendments, "which were designed to protect persons from oppressive governmental practices, * * * " *Id.*, 354 US at 21-22. Because Congress had no authority to remove these constitutional protections from civilians or to usurp the jurisdiction of the civil courts, the court-martial took place without subject-matter jurisdiction.

Thus, *Kalb*, *Fidelity* and *Reid* involved the judgments of courts that attempted to exceed the constitutional limits of their subject-matter jurisdiction. The state court judgment in *Kalb* would have usurped a power vested exclusively in Congress. The bankruptcy judgment in *Fidelity* would have extended the jurisdiction of that court beyond the scope of the "case and controversy" limitation of Article III and stripped the Indian Nations of their sovereign immunity. The court-martial in *Reid* would have encroached upon the jurisdiction of the civil courts and divested civilians of constitutional protections. It is the presence of these constitutional transgressions that make those judgments void and subject to collateral attack, and which distinguish them from the judgments considered in *Stoll* and *Chicot County*. Conventional notions of finality of judgments simply cannot defeat constitutional mandates.

This elemental distinction was apparent to the District Court that decided *Town of Springfield, Vt. v. McCarren*, 549 F Supp 1134 (D Vt 1982) *affirmed* 722 F2d 728 (2nd Cir 1983). Springfield applied to the Federal Energy Regulatory Commission (FERC) for a license to operate a hydroelectric project. A neighboring town petitioned the Vermont Public Service Board (VPSB) for a ruling that the project was subject to VPSB jurisdiction. Springfield appeared before the VPSB, which ruled that it had jurisdiction

over the project and forbid Springfield from proceeding until it obtained a VPSB certificate. Springfield did not appeal to the Vermont Supreme Court. Instead, it sued VPSB and the neighboring town in Federal District court, seeking a declaratory judgment that FERC possessed exclusive jurisdiction to license the project. VPSB claimed its ruling was *res judicata* and could not be collaterally attacked. *Id.*, at 1147. The neighboring town cited footnote nine in support of the VPSB claim that its determination of subject-matter jurisdiction was not susceptible to collateral attack. *Id.*, at 1148, n.5. The District Court rejected that footnote nine interpretation, citing *Kalb* and holding that the principles of *res judicata* did not apply because "the policy against permitting [VPSB] to act beyond its jurisdiction outweighs the policy underlying the doctrine of *res judicata*." *Id.*, at 1148. Accordingly, the court ruled that the VPSB ruling *was* subject to collateral attack. *Id.*, at 1149. Thus, the only Federal court to review footnote nine in detail has construed it to comprise a general rule subject to exceptions.

The Oregon Supreme Court, on the other hand, has reached a completely different conclusion regarding the meaning of footnote nine. It considered the footnote to be the leading authority ushering in a "modern rule on conclusiveness of determinations of subject matter jurisdiction [that] gives finality substantially greater weight than validity." *Lincoln Loan*, 340 Or at 628 [*quoting Restatement, Judgments 2d*, § 12]. Under this rule, the constitutional magnitude of a court's violation of its subject-matter limitations is irrelevant. Under the "modern rule" as set forth in footnote nine, Oregon interpretation, the only question a court must determine is whether the party bringing the collateral attack had a prior opportunity to

litigate the question of subject-matter jurisdiction, because the footnote nine rule is absolute and without exceptions.

3. This Court Should Grant Certiorari To Clarify The Law of Void Judgments In The Context of Subject-Matter Jurisdiction

As the Oregon Supreme Court points out, * * * although many cases discuss the importance of subject matter jurisdiction or state that lack of subject matter jurisdiction never can be waived, very few modern decisions * * * have permitted a party to set aside a final, litigated judgment in an earlier case for lack of subject matter jurisdiction, * * * *Lincoln Loan*, 340 Or at 627

Although numerous courts recite the mantra that a void judgment is a nullity and subject to collateral attack, no consensus exists concerning what makes a judgment void. As a result, courts have devised various formulas in attempts to distinguish a void judgment from one that is merely erroneous. *See, e.g., Kansas City Southern Ry. Co. v. Great Lakes Carbon*, 624 F2d 822, 825, *cert den* 449 US 955, 202 S Ct 363, 66 L Ed 2d 220 (8th Cir 1980) (a void judgment "occurs only where there is a plain usurpation of power, * * * "); *United States v. Tittjung*, 235 F3d 330, 335 (7th Cir 2000), *cert den* 533 US 931, 121 S Ct 2554, 150 L Ed 2d 721 (2001) ("Only when the jurisdictional error is "egregious" will courts treat the judgment as void."); *O'Rourke Bros. Inc. v. Nesbitt Burns, Inc.*, 201 F3d 948, 951 (7th Cir 2000) (judgment is void if court entered a decree "not within the powers granted to it by the law"); *Nemaizer v. Baker*, 793 F2d 58, 65 (2nd Cir 1986) (judgment not void unless "no arguable basis" for jurisdiction exists [citing *Lubben v. Selective Service Sys. Local Board No. 27*, 453 F2d 645, 649 (1st Cir 1972)]). One circuit has approved the use of a

multi-factor test to determine whether a judgment is void and subject to collateral attack. *Town of Springfield, Vt. v. McCarren*, *supra*, 549 F Supp 1134, 1147-49 (D Vt 1982), *affirmed* 722 F2d 728 (2nd Cir 1983).

Because these several tests employ vague or nebulous terms, they leave great gaps open to interpretation, and those interpretations, in turn, surely will lead to inconsistent results. Granting certiorari in this case will allow this Court to revisit the question of what constitutes a void judgment and to lay out a single, clear test for all circuits to follow consistently, thus promoting regularity in the law.

Further, this Court has developed and explained the constitutional function of subject-matter jurisdiction in a series of cases following *Stoll, Chicot County, Kalb* and *Fidelity*. For example, in *Ruhrgas AG v. Marathon Oil Co.*, 526 US 574, 583, 119 S Ct 1563, 143 L Ed 2d 760 (1999), this Court pointed out that subject-matter limitations "keep the federal courts within the bounds the Constitution and Congress have prescribed." Likewise, in *Steel Co. v. Citizens for a Better Environment*, 523 US 83, 101, 118 S Ct 1003, 140 L Ed 2d 210 (1998), this Court explained that subject-matter issues serve as an "essential ingredient of separation and equilibration of powers, * * * " These structural aspects of subject-matter jurisdiction were not expressly recognized or discussed in *Stoll, Chicot County,* and *Fidelity.*

The federal circuits lack a uniform test to determine when a judgment is void because they still lack a clear understanding of the constitutional basis of subject-matter limitations. A single case drawing together and explicating subject-matter limitations in the context of a void judgment

would satisfy this need. Acceptance of certiorari would enable this Court to explain that void judgments are subject to collateral attack only when they involve unconstitutional action by a court. This Court permits collateral attacks on void judgments for the same reason that the acts of the political branches of government are always subject to review for constitutional compliance and, if found unconstitutional, are held to be void. Collateral attacks do not serve "any principle of perpetual remediability"; rather, they prevent unconstitutional actions from acquiring legitimacy. *See, e.g., Freytag v. Commissioner*, 501 US 868, 896-97, 111 S Ct 2631, 115 L Ed 2nd 764 (1991) (Justice Scalia, joined by Justices O'Connor, Kennedy and Souter, concurring in part and concurring in the judgment).

This case presents an appropriate opportunity for the Court to expound on the issue of void judgments. It involves a judgment rendered by a court lacking *any* subject-matter jurisdiction. It involves the usurpation of the appellate jurisdiction vested in the Oregon Supreme Court by the Oregon Constitution. It involves a legislative expansion of its limited power to create courts, and the concomitant infringement upon the power reserved by the Oregon Constitution to the sovereign alone.

CONCLUSION

Petitioner's trial court judgment is a valuable property right that has been taken from it by a void judgment issued by a "pretend" court lacking any subject-matter judicial jurisdiction whatsoever. The Oregon Court of Appeals did not mistakenly interpret its jurisdiction; it lacks any judicial jurisdiction and it lacks any arguable basis upon which to find jurisdiction. The Oregon state courts have denied Petitioner any relief from this void judgment, and they have premised this denial upon a misapprehension of this Court's meaning in *Insurance Corp.*, footnote nine. This is wrong. Due process requires judicial action to arise only from courts enjoying subject-matter jurisdiction. Due process also requires that Petitioner's collateral attack upon a void judgment be determined on its merits and on law and fact, not on the basis of long-held but false assumptions that the Oregon Constitution had been amended to give the legislature authority to create courts, and certainly not on preclusive principles of *res judicata*. This Court should resolve the ambiguity involving the meaning and authority of footnote nine in *Insurance Corp.*, and the conflict between courts concerning its interpretation, and this case provides an apt vehicle for it to do so.

Respectfully submitted,

RIDGWAY K. FOLEY, JR., P.C.
GREENE & MARKLEY, P.C.

RIDGWAY K. FOLEY, JR., P.C.
Counsel of Record for Petitioner

STEVEN E. BENSON

Endnote (from page 13):
Federal Circuits citing *Insurance Corp.* footnote nine as authority:

Second Circuit:

Corbett v. MacDonald, 124 F3d 82, 88 (2nd Cir 1996)

Board of Electric Light Comm. v. McCarren, 725 F2d 176, 178 (2nd Cir 1983)

Fourth Circuit:

ACLI Government Securities, Inc., v. Rhoades, 764 F2d 1033, 1035 (4th Cir 1985)

Fifth Circuit:

Beiser v. Weyler, 284 F3d 665 (5th Cir 2002)

Royal Insurance Co. v. Quinn-L Corp., 960 F2d 1286, 1293, *reh den* 966 F2d 674 (5th Cir 1992)

Picco v. Global Marine Drilling Co., 900 F2d 846 850 (5th Cir 1990)

Republic Supply Co. v. Shoaf, 815 F2d 1046, 1053 (5th Cir 1987)

Sixth Circuit:

Pratt v. Ventas, Inc., 365 F3d 514 (6th Cir 2004)

United States v. Dailide, 316 F3d 611, 619, n.4, *cert den sub nom Dailide v. United States*, 540 US 876, 124 S Ct 263, 157 L Ed 2d 138 (6th Cir 2003)

Fletcher v. City of Paducah, 911 F2d 732 (6th Cir 1990)

Seventh Circuit:

United States v. Tittjung, 235 F3d 330, 335 (7th Cir 2000) (n. 9 controls in unexceptional circumstances)

United States v. County of Cook, Illinois, 167 F3d 381, 388, *cert den sub nom US v. Cook County*, 528 US 1019, 120 S Ct 527, 145 L Ed 2d 408 (7th Cir 1999) (n. 9 is norm, but recognizes exception in Restatement (2nd) of Judgments (1982)

Eighth Circuit:

Miehl v. Greyhound Lines, Inc., 23 Fed Appx 611, 614 (8th Cir 2001)

Ninth Circuit:

City of South Pasadena v. Mineta, 284 F3d 1154, 1157 (9th Cir 2002)

United States v. Matta-Ballesteros, 71 F3d 754, 762 (9th Cir 1995), *op amended, other grounds, reh den*, 98 F3d 1100 (1996), *cert den sub nom Matta-Ballesteros v. United States*, 519 US 1118, 117 S Ct 965, 136 L Ed 2d 850 (1997)

In re Ivory, 70 F3d 73, 75 (9th Cir 1995)

United States v. Van Cauwenberghe, 934 F2d 1048, 1058 (9th Cir 1991)

Donovan v. Mazzola, 761 F2d 1411, 1416 (9th Cir 1985)

Tenth Circuit:

In re Jones, 804 F2d 1133, 1136, n. 7 (10th Cir 1986)

136 P.3d 1

Supreme Court of Oregon.

Argued and submitted March 10, 2005, judgment of circuit court affirmed May 25, 2006

LINCOLN LOAN COMPANY, an Oregon corporation, *Petitioner on Review*,

v.

The CITY OF PORTLAND, a municipal corporation, *Respondent on Review*,

and

STATE OF OREGON, *Intervenor-Respondent on Review.*

(CC 0307-07891; CA A124756; SC S51666).

136 P3d 1

Appeal certified from the Court of Appeals.*

Ridgway K. Foley, Jr., of Greene & Markley, P.C., Portland, argued the cause and filed the briefs for petitioner on review. With him on the briefs was Steven E. Benson, Portland.

Harry M. Auerbach, Senior Deputy City Attorney, Portland, argued the cause for respondent on review.

Mary H. Williams, Solicitor General, Salem, argued the cause for intervenor-respondent on review State of Oregon.

Thomas M. Christ, Portland, filed an amicus curiae brief for himself.

---

* Appeal from Multnomah County Circuit Court, Linda L. Bergman, Judge.

Before Carson, C.J.,** Gillette, Durham, Riggs, Balmer, and Kistler, JJ.***

BALMER, J.

The judgment of the circuit court is affirmed.

BALMER, J.

In this declaratory judgment action, plaintiff challenges the constitutionality of the procedure by which the voters adopted Article VII (Amended) of the Oregon Constitution in 1910. For the reasons that follow, we conclude that plaintiff may not challenge that procedure in this case. Accordingly, we affirm the circuit court's judgment in favor of defendant.

The issue arises in prosaic circumstances. In 1995, plaintiff Lincoln Loan obtained a money judgment against defendant City of Portland in Multnomah County Circuit Court (the "1995 judgment"). Defendant appealed, and the Court of Appeals reversed the judgment. *Lincoln Loan Co. v. City of Portland*, 158 Or. App. 574, 976 P.2d 60 (1999), *rev. den.*, 330 Or. 138, 6 P.3d 1098, *cert. den.*, 531 U.S. 1013 (2000) (*Lincoln Loan I*). After the final appellate judgment in that case had issued, plaintiff filed this declaratory judgment action seeking to set aside that judgment on the ground that the Court of Appeals "does not lawfully exist" and to obtain a declaration that the 1995 judgment is valid and enforceable.

** Chief Justice when case was argued.

*** De Muniz, Chief Justice when the decision was rendered, did not participate in the consideration or decision of this case.

Plaintiff alleged that the 1910 initiative measure that amended Article VII violated the Oregon Constitution because it had been adopted improperly. Plaintiff argued that the 1910 initiative (1) encompassed multiple constitutional amendments that were not closely related, but did not permit voters to vote separately on each amendment, in violation of Article XVII, section 1, of the Oregon Constitution; (2) had been enacted without complying with the canvass and proclamation requirements of Article XVII, section 1; and (3) failed to set forth the full text of the proposed constitutional amendment in violation of Article IV, section 1(2)(d), of the Oregon Constitution. Plaintiff asserted that, absent the provisions of Article VII (Amended) that had been made part of the constitution by the 1910 initiative, the legislature had no authority to enact the statutes by which it created the Court of Appeals in 1969. Therefore, plaintiff contended, the Court of Appeals did not lawfully exist and had "no jurisdiction and no authority" to overturn the 1995 judgment.

The trial court entered summary judgment in favor of defendant, holding that plaintiff had filed its challenge to the 1910 initiative too late to comply with any applicable statutes of limitations and that plaintiff had no standing to challenge the 1910 initiative. Plaintiff appealed. The Court of Appeals certified the appeal to this court, and we accepted that certification.

As we describe more fully below, we conclude that the final judgment in *Lincoln Loan I* bars plaintiff from bringing this action. Plaintiff could have raised the legal theories that it asserts in this declaratory judgment proceeding in the earlier case that it brought against defendant. Plaintiff litigated that case to final judgment. Under longstanding principles of claim preclusion,

plaintiff may not collaterally attack that final judgment in this proceeding.

I. PLAINTIFF'S THEORY OF THE CASE

1. We first outline plaintiff's theory of the case. As noted previously, plaintiff asserts that the procedure by which the voters adopted Article VII (Amended) in 1910 suffered from three constitutional defects. For that reason, according to plaintiff, Article VII (Amended) never became part of the Oregon Constitution, and Article VII (Original) "remains in full force and effect today." Article VII (Original), section 1, provides, in part, that "[t]he Judicial power of the State shall be vested in a Supr[e]me Court, Circuit[ ] Courts, and County Courts * * * " That provision also refers to justices of the peace and to municipal courts. However, Article VII (Original) does not mention or provide for an intermediate Court of Appeals and does not authorize the legislature to create a Court of Appeals – or, indeed, any court. In contrast, Article VII (Amended), section 1, provides, in part:

> "The judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law. * * * "

The legislature created the Court of Appeals in 1969. Or. Laws 1969, ch 198. If Article VII (Amended), section 1, is a valid part of the Oregon Constitution, then the legislature had the authority to create the Court of Appeals, and plaintiff's claim fails. If Article VII (Amended), section 1, is *not* a valid part of the Oregon Constitution, then the legislature had no authority to create the Court of Appeals, the Court of Appeals had no authority to reverse plaintiff's 1995 judgment against defendant, and that

judgment, as plaintiff alleges, "is valid and enforceable in its entirety."

II. DEFENDANT'S CLAIM PRECLUSION ARGUMENT

Defendant answered the complaint by admitting and denying plaintiff's allegations and asserting a number of affirmative defenses. Among those affirmative defenses, defendant asserted that the trial court should decline to exercise jurisdiction over plaintiff's declaratory judgment action because "[p]laintiff had a more appropriate remedy to challenge the jurisdiction of the Court of Appeals by direct challenge to such jurisdiction in response to defendant's appeal of the [1995 judgment]." Defendant also raised a related affirmative defense of estoppel, asserting that, by participating throughout the litigation of *Lincoln Loan I*, "plaintiff affirmatively asserted the benefit of provisions of Article VII as amended by the initiative measure plaintiff attacks in this action."[1]

Although defendant did not denominate it as such in its answer, those affirmative defenses squarely raise the issue whether, under the doctrine of claim preclusion, the entry of a final, litigated judgment in *Lincoln Loan I* bars plaintiff from bringing this action. We begin by outlining the contours of claim preclusion and then consider the

---

[1] In *Lincoln Loan I*, defendant asserted in its brief in the Court of Appeals that that court had jurisdiction over the appeal of the 1995 judgment. In *its* brief, plaintiff stated that it "accept[ed] Defendant's statement of the basis of and dates governing its appeal." Plaintiff separately invoked the jurisdiction of the Court of Appeals in *Lincoln Loan I* by filing a notice of cross-appeal challenging the trial court's order granting a directed verdict in favor of certain individual defendants in that case.

application of those principles to this declaratory judgment proceeding.

2, 3. This court recently described claim preclusion in *Bloomfield v. Weakland*, 339 Or. 504, 510-11, 123 P.3d 275 (2005):

> "The doctrine of claim preclusion, formerly known as *res judicata*, generally prohibits a party from relitigating the same claim or splitting a claim into multiple actions against the same opponent. As this court stated in *Rennie v. Freeway Transport*, 294 Or. 319, 323, 656 P.2d 919 (1982),
>
> > "'a plaintiff who has prosecuted one action against a defendant through to a final judgment binding on the parties is barred on *res judicata* grounds from prosecuting another action against the same defendant where the claim in the second action is one which is based on the same factual transaction that was at issue in the first, seeks a remedy additional or alternative to the one sought earlier, and is of such a nature as could have been joined in the first action.'
>
> "*See also Drews v. EBI Companies*, 310 Or. 134, 140-41, 795 P.2d 531 (1990) (to same effect). The rule forecloses a party that has litigated a claim against another from further litigation on that same claim on any ground or theory of relief that the party could have litigated in the first instance. *Dean v. Exotic Veneers, Inc.*, 271 Or. 188, 194, 531 P.2d 266 (1975)."

As an initial matter, the doctrine of claim preclusion appears to apply to plaintiff's complaint here. The record demonstrates that in 1994 plaintiff filed an action against

defendant (and others) and that, in 1995, plaintiff filed a fourth amended complaint that, in part, alleged violations of its federal constitutional rights and sought damages under 42 USC section 1983. As a result of a jury verdict, plaintiff obtained the 1995 judgment against defendant, which awarded plaintiff damages of more than $2.7 million. Defendant appealed that judgment, and plaintiff participated in the appeal, briefing and arguing the appeal in the Court of Appeals. After the Court of Appeals reversed the 1995 judgment, plaintiff filed a petition for review by this court, which this court denied, and then it filed a petition for a writ of *certiorari* from the United States Supreme Court, which that court denied. Ultimately, as the complaint in this action alleges, in August 2000, the circuit court clerk entered an appellate judgment issued by the Court of Appeals pursuant to its opinion reversing the 1995 judgment. The entry of that appellate judgment concluded the earlier litigation between plaintiff and defendant.

To bring a declaratory judgment action, a plaintiff must allege that its "rights, status or other legal relations are affected" by, *inter alia*, a constitutional provision or statute. ORS 28.020. Plaintiff argues that the 1995 judgment was a property right of plaintiff's that was impaired when the Court of Appeals reversed it and that the alleged constitutional infirmity of the Court of Appeals "affected" plaintiff's rights because the Court of Appeals had no authority to reverse the 1995 judgment. Plaintiff's complaint seeks a declaration that the 1995 judgment "is valid and enforceable." Thus, the only claim that plaintiff asserts in its complaint in this action arises from the Court of Appeals' reversal of the 1995 judgment and the subsequent entry of a final judgment in defendant's favor.

That description of *Lincoln Loan I* demonstrates that, at least as an initial matter, plaintiff's claim appears to be barred by claim preclusion. To use this court's words in *Bloomfield*, quoting its earlier decision in *Rennie*, plaintiff "prosecuted one action against a defendant through to a final judgment binding on the parties" and plaintiff now is "prosecuting another action against the same defendant where the claim * * * is one which is based on the same factual transaction that was at issue in the first * * * " *Bloomfield*, 339 Or. at 510-11.

Here, in seeking to revive the 1995 judgment, plaintiff is pursuing the same relief that it sought at trial and through the appellate stages of the earlier litigation. Again using the words of *Bloomfield*, the remedy plaintiff seeks "is of such a nature as could have been joined in the first action." *Id.* at 511. Although plaintiff, in this proceeding, seeks to restore the effect of the 1995 judgment by having this court hold that the Court of Appeals lacked authority to reverse that judgment, that issue could have been raised in the earlier litigation. Defendant points out, and plaintiff does not dispute, that plaintiff could have raised the constitutional challenges that it mounts in this case before the Court of Appeals or before this court during the appeal of the 1995 judgment. Well-settled principles of claim preclusion "foreclose[ ] a party that has litigated a claim against another from further litigation on that same claim on any ground or theory of relief *that the party could have litigated* in the first instance." *Id.* (emphasis added).

We agree with defendant that, in this proceeding, plaintiff asserts the same claim that it asserted in the earlier case, that it seeks recovery from the same party, and that the "ground[s] or theor[ies]" that plaintiff asserts here – specifically, its challenges to the 1910 adoption of

Article VII (Amended) and the related claim that the Court of Appeals was unconstitutionally established – could have been raised and litigated in the prior case. Accordingly, principles of claim preclusion ordinarily would bar plaintiff from bringing this case.

III. CLAIM PRECLUSION AND SUBJECT MATTER JURISDICTION

Plaintiff argues, however, that claim preclusion and related doctrines do not apply to plaintiff's claim here because the Court of Appeals lacked subject matter jurisdiction to review and reverse the 1995 judgment. In plaintiff's words, because of the constitutional defects in the adoption of Article VII (Amended), the legislature had no authority to create the Court of Appeals, and that court therefore is a "pretend" or "non-existent" court. Because the Court of Appeals lacked subject matter jurisdiction, according to plaintiff, the resulting final judgment in *Lincoln Loan I* is void, and "[o]ne may challenge a void judgment at any time."

Plaintiff correctly observes that some court decisions recognize a narrow exception to the claim preclusion rules described above when the prior judgment was void because the court that rendered it lacked jurisdiction. The more difficult issues, however, are the scope of that exception and whether the judgment that plaintiff challenges here comes within that exception. We now turn to those issues.

A. *Background*

4-6 As we consider the relevant authorities, it will be helpful to keep in mind the underlying purposes of the

doctrine of claim preclusion and of the exceptions to the doctrine. It is axiomatic that "[a] judgment may properly be rendered against a party only if the court has authority to adjudicate the type of controversy involved in the action." *Restatement (Second) of Judgments* § 11 (1982). Ordinarily, however, if a party to a proceeding contends that a particular court lacks the authority to adjudicate the proceeding, then that party must raise that issue with the court before the judgment becomes final. *Id.* at § 11 comment d. When a question is raised as to whether a particular court has subject matter jurisdiction over a proceeding, that court has authority to decide the question. *Id.* at § 11 comment c; *see also Clawson et ux v. Prouty et ux*, 215 Or. 244, 249, 333 P.2d 1104 (1959) ("Every court confronted with a law suit of any kind is under both the necessity and the duty of determining whether or not it has jurisdiction to entertain the suit, and it necessarily has jurisdiction to make this determination.") (internal quotations and citations omitted).

7. As described above, the doctrine of claim preclusion generally bars a party from challenging in a separate proceeding issues that were or could have been determined in a prior, litigated action between the same parties. That principle applies to the issue of subject matter jurisdiction, with limited exceptions. The *Restatement* articulates the rule as follows:

> "*When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation* except if:
>
> "(1) The subject matter of the action was so plainly beyond the court's jurisdiction that its

entertaining the action was a manifest abuse of authority; or

"(2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or

"(3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction."

Restatement at § 12 (emphasis added).

The *Restatement* rule attempts to accommodate two principles that, in some cases, may conflict: the *finality* of a judgment and the *validity* of a judgment. As the drafters of the *Restatement* put it:

"The principle of finality has its strongest justification where the parties have had full opportunity to litigate a controversy, especially if they have actually contested both the tribunal's jurisdiction and the issues concerning the merits. Yet the principle of finality rests on the premise that the proceeding had the sanction of law, expressed in the rules of subject matter jurisdiction. * * * If the question [of subject matter jurisdiction as decided by the tribunal whose jurisdiction is challenged] is decided erroneously, and a judgment is allowed to stand in the face of the fact that the court lacked subject matter jurisdiction, then the principle of validity is compromised. On the other hand, if the judgment remains indefinitely

> subject to attack for a defect of jurisdiction, then the principle of finality is compromised."

Id. at § 12 comment a.

B. *Oregon Cases*

With that background in mind, we turn to the principal Oregon cases upon which plaintiff relies in arguing that claim preclusion should not bar its challenge to the Court of Appeals' authority to render its decision in *Lincoln Loan I.* Although, as we shall see, those cases are easily distinguishable, we discuss them here because they illustrate at least some of the principles discussed above and narrow the issue that we must decide in this case. We later return to cases from other jurisdictions and to the *Restatement.*

Plaintiff cites *Hughes v. Aetna Casualty Co.*, 234 Or. 426, 383 P.2d 55 (1963), for the proposition that one may challenge a void judgment at any time. In that case, this court held that an adoption decree was void as to the biological mother, who never had received notice of the proceeding or consented to the adoption. Because the mother received no notice, she had no opportunity to raise *any* legal challenge. Here, of course, both parties participated fully in the earlier litigation, and plaintiff could have raised in the earlier case every legal issue that it raises here.

Dixie Meadows Co. v. Kight, 150 Or. 395, 45 P.2d 909 (1935), on which plaintiff also relies, is similar. Plaintiff cites that case as holding that "[o]ne may maintain a suit in equity to set aside a final judicial determination in another case where the former court lacked jurisdiction to enter the judgment." However, in *Dixie Meadows*, the

defendant in the earlier case never had been served properly, and the judgment at issue was a default judgment. This court stated that, even if the defendant in the earlier case had received actual notice of the proceeding, the plaintiff's service on the defendant had been ineffective because it had not met statutory service requirements. *Id.* at 405. For that reason, the court in the earlier case did not acquire personal jurisdiction over the defendant before entering the default judgment, and the defendant therefore could seek to set aside that judgment in a later proceeding. In this case, in contrast, the parties were served properly in the earlier case, and they litigated the case fully at the trial and appellate levels. Unlike the defendants in *Hughes* and *Dixie Meadows*, plaintiff here hardly can claim that it would be inequitable to enforce the litigated judgment in the earlier case.

Plaintiff's other cases are similarly unhelpful. Plaintiff cites *Smith v. Cameron et al.*, 123 Or. 501, 262 P. 946 (1928), which states that, if a court lacks jurisdiction, its judgment is a nullity. *Id.* at 506. In that case, the plaintiff had filed an action, and the trial court had entered judgment for the plaintiff, before the legislature had passed a statute authorizing the relief that the plaintiff sought. On appeal, this court determined that the "action was prematurely commenced" and reversed. *Smith* thus stands for the unremarkable proposition that a party to an action may *appeal* an adverse judgment and challenge the trial court's jurisdiction to enter that judgment. *Smith*, however, provides no support for plaintiff's argument that it should be permitted to mount a *collateral* attack on a final, litigated judgment in a prior proceeding between the same parties.

Finally, plaintiff relies on *Hanley v. City of Medford*, 56 Or. 171, 108 P. 188 (1910). Plaintiff states that, in *Hanley*, "both parties appeared and tried a case to a judge [who was] subsequently found to lack authority to conduct that trial." Plaintiff asserts that, in *Hanley*, this court rejected the argument that the jurisdictional defect should have been litigated by appealing the challenged judgment and held instead that it was permissible for a party to bring a later action in equity to challenge the earlier judgment on the grounds that the court that entered the judgment lacked subject matter jurisdiction. Although the procedural posture of *Hanley* was unusual, the result and this court's rationale were not – and they provide little support for plaintiff. Nevertheless, because plaintiff relies on *Hanley*, and because *Hanley* is more similar to this case than any of the other cases that plaintiff cites, we discuss *Hanley* in some detail.[2]

Hanley involved a judgment entered in an earlier case between the City of Medford and Hanley. The city had filed a condemnation complaint in circuit court, and Hanley had appeared by filing a demurrer. 56 Or. at 172. The city, seeking a quick trial of the matter, applied to the trial judge for a special term of court, but the trial judge denied the application. *Id.* at 172-73. At the request of a

---

[2] In discussing and distinguishing *Hanley*, we do not necessarily approve the analysis and result in that case. The decision in *Hanley* and the *dictum* on which plaintiff relies reflect an earlier and more limited view of claim preclusion that gave less weight to the principle of finality than do the modern cases in Oregon and other jurisdictions. *See generally Restatement (Second) of Judgments* § 12 comment a & Reporter's Note (1982) (describing differences between "traditional doctrine" of *res judicata* and "modern rule on conclusiveness of determinations of subject matter jurisdiction").

county official, the Governor, without the approval or consent of the original trial judge, appointed a different circuit court judge from a different judicial district to try the case. The case was tried, but Hanley did not participate. *Id.* at 173. Hanley lost, and the court entered a judgment condemning a portion of his property. Hanley immediately filed a separate case seeking to clear the cloud on his title caused by the condemnation judgment and to prevent the city from trespassing on his land. He argued that the Governor lacked the authority to appoint a different judge to try the case and that the condemnation judgment therefore was void. *Id.* at 174.

We note first that plaintiff misstates in a critical respect the facts of *Hanley*, making *Hanley* appear more similar to this case than it actually is. As described above, Hanley did not "tr[y the case] to a judge subsequently found to lack authority to conduct that trial." Rather, after the trial was turned over to a different judge that Hanley asserted lacked jurisdiction, Hanley declined to participate. In contrast, of course, plaintiff here participated fully in the appeal of the judgment that it now attacks, filing briefs, arguing the case in the Court of Appeals, filing a petition for review, and filing a petition for *certiorari*. Plaintiff cannot assert credibly that it stands in the same position as Hanley.

Second, the statement in *Hanley* on which plaintiff relies to support its position that it may attack an earlier judgment collaterally is a *dictum*, as this court decided that case on a different ground. This court briefly set out the city's and Hanley's arguments before moving to a different equitable basis for its disposition of the case:

> "It is urged by the [city] that, although the judgment is void, plaintiff's remedy was by appeal from the supposed judgment, and that equity will not entertain a suit to set aside or cancel a judgment that upon its face is void. But some of the cases last cited go so far as to say that *when there was no court no judgment could by law have been pronounced; that what was done under such circumstances was not only a nullity in the ordinary significance of the term, when applied to judgments of courts having no jurisdiction over the subject-matter or the parties, but is not even the act of a court, and therefore not susceptible of an appeal,* or subject to revision in an appellate tribunal. * * * The writer is inclined to agree with this view of the law, *but it is not necessary to rely upon such principle*; for the plaintiff has alleged and shown that the pretended judgment is a cloud upon his title, and also that under cover thereof the defendant city is about to trespass upon plaintiff's premises, and dig up and destroy the substance of his estate. This court has held that, when the real purpose of invoking the interposition of equity is to prevent a cloud being cast upon plaintiff's title to real property, jurisdiction will be assumed."

56 Or. at 183-84 (emphasis added; citation omitted).

The *dictum* in *Hanley* leaves open the possibility that, beyond cases where a court lacks subject matter jurisdiction but nevertheless enters a judgment – in which cases, the party contesting jurisdiction must assert that claim on appeal – some purportedly judicial acts may be ignored because they were decided by "no court." Those rare cases are "not even the act of a court, and therefore not susceptible of an appeal." In those circumstances, a party need

not appeal the result, which is "no judgment," but may pursue a collateral attack in a different case. However, nothing in *Hanley* suggests that the court considered the factual situation there to come within that exception. Instead, the court held that it had equitable jurisdiction to consider Hanley's effort to clear the cloud on his title and prevent the city from trespassing on his property.

Our review of the Oregon cases discloses no support for plaintiff's argument that it may litigate a case to a final appellate judgment in an Oregon court and then collaterally attack the lawful existence of the court that issued the judgment in a separate proceeding.

C. *Federal Cases*

Federal cases applying claim preclusion principles reach the same result. The leading case is *Stoll v. Gottlieb,* 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938), in which the United States Supreme Court considered a state court judgment that had declined to give *res judicata* effect to an earlier bankruptcy court judgment. The Court reversed, holding that even if the bankruptcy court had lacked subject matter jurisdiction, that court's final judgment barred later litigation between the parties on the same issue:

> "Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter. * * * We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did

> have jurisdiction of the subject matter of the litigation."

305 U.S. at 171-72.

In *Stoll*, the issue of subject matter jurisdiction was litigated in the first proceeding, but in *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940), the Court explicitly extended the principle to cases in which the issue could have been raised, but was not. The rule is now well settled in the federal courts:

> "A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not * * * reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations – both subject matter and personal."

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n. 9, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982). In summary, federal cases applying the principles of claim preclusion do not support plaintiff's position that it may now collaterally attack the earlier judgment.

D. *Other Authorities*

As discussed above, although many cases discuss the importance of subject matter jurisdiction or state that lack of subject matter jurisdiction never can be waived, very few modern decisions – and none remotely similar to this case – have permitted a party to set aside a final, litigated judgment in an earlier case for lack of subject matter jurisdiction, where the issue was or could have been raised

in the earlier proceeding. Nevertheless, the doctrine of claim preclusion encompasses the principle of the validity of a judgment, as well as the principle of finality. The *Restatement* recognizes that giving preclusive effect to a prior judgment when the issue of subject matter jurisdiction was not litigated and when there is substantial question as to whether the court had subject matter jurisdiction, poses a "genuine dilemma." *Restatement* at § 12 comment d. To consider whether any substantial authority supports plaintiff's position here, we return to the *Restatement's* discussion of the exceptions to the general rule that a party to a final judgment may not challenge the court's subject matter jurisdiction in a later proceeding. In doing so, we do not suggest that the *Restatement* necessarily provides a complete or entirely accurate statement of Oregon claim preclusion law, but instead rely upon it as a useful articulation of contemporary principles of claim preclusion.

Section 12 of the *Restatement*, quoted above, sets out three exceptions to the general rule, only one of which is even arguably pertinent here: that the "subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority." *Restatement* at § 12(1). The issue before us thus narrows to whether plaintiff has demonstrated that the Court of Appeals' exercise of jurisdiction in reviewing the 1995 judgment and issuing its decision in *Lincoln Loan I* was "a manifest abuse of authority." To state that proposition is to refute it. This case simply does not come within the exception to the preclusion rule described in *Restatement* § 12(1), as we elaborate below.

First, the importance of finality in litigation means that the exception to the claim preclusion rule applies in

only the most limited circumstances. The *Restatement* explains the background of section 12 by noting that the "traditional doctrine" gave greater emphasis to the principle of validity, "asserting that a judgment of a court lacking subject matter jurisdiction was 'void' and forever subject to attack." *Restatement* at § 12 comment a. However, the "modern rule on conclusiveness of determinations of subject matter jurisdiction gives finality substantially greater weight than validity." *Id.*[3] Moreover, as with other aspects of claim preclusion, "[e]ven if the issue of subject matter jurisdiction has not been raised and determined, the judgment after becoming final should ordinarily be treated as wholly valid if the controversy has been litigated in any other respect." *Id.* at § 12 comment d. The exceptions to claim preclusion apply only in "very limited circumstances," *Restatement* at § 69 comment a, and are "defined in terms of conduct that usually is clearly manifested," such as "plain excess of authority." *Id.* at § 69 comment c.

Second, as described in detail above, plaintiff argues that the Court of Appeals "does not lawfully exist" because the constitutional provision that the legislature relied upon in establishing that court is invalid. Plaintiff's theory, however, is a novel and (literally) unprecedented challenge to a constitutional provision, Article VII (Amended), that was adopted almost a century ago. In the ensuing years, the legislature has referred to the people and the people have adopted nine different amendments to Article VII (Amended), each of which was based on the

---

[3] The Reporter's Note to *Restatement* § 12 cites *Stoll v. Gottlieb*, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938), discussed above, as "the leading modern case."

premise that Article VII (Amended) is a valid part of the Oregon Constitution. *See Carey v. Lincoln Loan Co.*, 203 Or. App. 399, 408 n. 8, 125 P.3d 814 (2005), *petition for review pending* (2006) (citing amendments).[4] Moreover, this court has relied on and applied Article VII (Amended), repeatedly affirming the authority that that article confers on the legislature to create courts and to define their jurisdiction. *See, e.g., State v. Harvey*, 117 Or. 468, 242 P. 440 (1926) (legislature had constitutional authority to create court of domestic relations); *In re Will of Pittock*, 102 Or. 159, 171-72, 199 P. 633, *on reh'g*, 202 P. 216 (1921) (confirming circuit court jurisdiction based on statute passed pursuant to legislature's authority under Article VII (Amended)). Indeed, in discussing the legislature's authority under that article, this court stated 50 years ago that the legislature "may provide for an intermediate court of appeals." *State ex rel Madden v. Crawford*, 207 Or. 76, 83, 295 P.2d 174 (1956). The governor, too, has assumed the validity of Article VII (Amended), section 1, approving legislation passed under that provision and appointing judges to courts created under that authority.

That brief review demonstrates that the voters, the legislature, this court, and the governor all have assumed, and acted for decades on the assumption, that Article VII (Amended) became a valid part of the Oregon Constitution in 1910. Whatever the merits of plaintiff's claim that Article VII (Amended) was unconstitutionally adopted in

---

[4] In *Carey*, the Court of Appeals rejected a challenge to that court's jurisdiction similar to the one presented here, holding that, even if the adoption of Article VII (Amended) was originally flawed, subsequent amendments to that article conferred authority on the legislature to create new courts by statute, including the Court of Appeals. 203 Or. App. at 407-15.

1910 – a question that we need not, and do not, decide in this case – the discussion above demonstrates that plaintiff has failed to show that "the subject matter of the action" – here, the Court of Appeals' review of the 1995 judgment – "was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority."

Our conclusion in that regard is buttressed by fact that the earlier litigation that plaintiff attacks in this case consisted not only of a proceeding before the Court of Appeals, but also of proceedings before *this* court. Even if plaintiff were correct that the Court of Appeals does not lawfully exist, plaintiff nevertheless had a statutory right to petition this court for review of the Court of Appeals decision. Plaintiff never has questioned the validity of this court, and plaintiff's present challenge to the Court of Appeals could have been raised in a petition for review. As discussed above, plaintiff did petition for review, but did not challenge the Court of Appeals' subject matter jurisdiction over the 1995 judgment. In those circumstances, the application of established claim preclusion principles to bar plaintiff's attempt to collaterally attack the prior judgment is not inequitable.

In sum, we hold that plaintiff's attempt to revisit an issue that could have been fully litigated in the Court of Appeals and in this court in the prior proceeding is simply inconsistent with well-settled principles of claim preclusion. For those reasons, we conclude that the circuit court was correct in entering judgment for defendant.

The judgment of the circuit court is affirmed.

IN THE SUPREME COURT OF THE
STATE OF OREGON

LINCOLN LOAN COMPANY,
an Oregon corporation,

Petitioner on Review,

v.

THE CITY OF PORTLAND,
a municipal corporation,

Respondent on Review,

and

STATE OF OREGON,

Intervenor-Respondent
on Review.

**APPELLATE JUDGMENT and
SUPPLEMENTAL JUDGMENT**

(CC 0307-07891; CA A124756; SC S51666)

(Filed: May 25, 2006)

On review from the Court of Appeals.*

Argued and submitted March 10, 2005.

Ridgway K. Foley, Jr., of Greene & Markley, P.C., Portland, argued the cause and filed the briefs for petitioner on review.

Harry M. Auerbach, Senior Deputy City Attorney, Portland, argued the cause for respondent on review.

---

* Appeal from Multnomah County Circuit Court, Linda L. Bergman, Judge.

Mary H. Williams, Solicitor General, Salem, argued the cause for intervenor-respondent on review State of Oregon.

Thomas M. Crist [sic], Eugene, filed a brief as *amicus curiae*.

Before Carson, C.J.**, Gillette, Durham, Riggs, Balmer, and Kistler, JJ.***

BALMER, J.

The Judgment of the circuit court is affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents on Review

[X] Costs allowed, payable by: Petitioner on Review

MONEY AWARD

Judgment #1

Creditor(s):	City of Portland
Attorney:	Harry Auerbach, 1221 SW Fourth Ave #430, Portland OR
Debtor(s):	Lincoln Loan Company
Attorney:	Ridgway K. Foley
Costs:	$ 220.20
TOTAL AMOUNT:	$ 220.20

** Chief Justice when case was argued.

*** De Muniz, Chief Justice when the decision was rendered, did not participate in the consideration or decision of this case.

Interest: Simple, 9% per annum, from the date of this appellate judgment.

MONEY AWARD

Judgment #2

Creditor(s):	State of Oregon
Attorney:	Mary Williams, 1162 Court NE #400, Salem OR 97301
Debtor(s):	Lincoln Loan Company
Attorney:	Ridgway K. Foley
Costs:	$ 226.45
TOTAL AMOUNT:	$ 226.45

Interest: Simple, 9% per annum, from the date of this appellate judgment.

MONEY AWARD

Judgment #3

Creditor(s):	City of Portland; State of Oregon
Attorney:	Harry Auerbach Mary H. Williams
Debtor(s):	Lincoln Loan Company
Attorney:	Ridgway K. Foley
Costs:	$ 100.00
TOTAL AMOUNT:	$ 100.00

Interest: Simple, 9% per annum, from the date of this appellate judgment.

Appellate Judgment
Effective Date: October 13, 2006

IN THE CIRCUIT COURT OF THE
STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

LINCOLN LOAN COMPANY, an Oregon corporation, Plaintiff, v. THE CITY OF PORTLAND, a municipal corporation, Defendant, And STATE OF OREGON, Intervenor	Case No. 0307-07891 GENERAL JUDGMENT AND MONEY AWARD (Filed Apr. 7, 2004) (Entered Apr. 14, 2004)

On January 21, 2004, this matter came before the court on cross-motions for summary judgment. Plaintiff, Lincoln Loan Company, appeared through its attorney, Ridgway K. Foley, Jr.; defendant, City of Portland, appeared through its attorney, Harry Auerbach; and intervenor, State of Oregon, appeared through its attorney, Stephen Bushong. Thomas Christ filed an *amicus* brief. The court, having heard arguments by the respective counsel and being fully advised, now, therefore, it is hereby

ORDERED AND ADJUDGED that plaintiff's motion for summary judgment is denied and the motions for summary judgment filed by defendant City of Portland and intervenor State of Oregon are granted.

IT IS FURTHER ORDERED AND ADJUDGED that defendant, City of Portland, have judgment against

plaintiff, Lincoln Loan Company, for its costs and disbursements in the amount of $411.00, in accordance with ORCP 68.

MONEY AWARD

1. The name and address of the judgment creditor are:

City of Portland
1221 SW Fourth Avenue, Room 340
Portland, OR 97204

2. The name, address and telephone number of the judgment creditor's attorney are:

Harry Auerbach, OSB #82183
Senior Deputy City Attorney
Office of the City Attorney
1221 SW Fourth Avenue, Room 430
Portland, OR 97204
Telephone: 503-823-4047

3. The judgment debtor is:

Lincoln Loan Company
[Address unknown]

Date of Birth: N/A
Social Security Number: N/A
Driver license number: N/A
State of issue: N/A

4. The name of the judgment debtor's attorney is:

Ridgway K. Foley, Jr., OSB #63024
Greene & Markley, PC
1515 SW Fifth Avenue, Suite 600
Portland, OR 97201
Telephone: 503-295-2668

5. No person or public body, other than the judgment creditor's attorney, is entitled to a portion of a payment on the judgment.

6. The amount of the judgment is: $0.00

7. No prejudgment interest is owed.

8. No attorneys' fees are claimed or owed.

9. Costs and disbursements, pursuant to Defendant's Cost Bill and in addition to judgment amount: $411.00.

10. Post-judgment simple interest at the rate of 9 percent per annum on all amounts, which consists of item 9 in the amount of $411.00, from the date of entry of the judgment until fully paid.

DATED this 6 day of April, 2004

/s/ Linda L. Bergman
HON. LINDA L. BERGMAN
Circuit Court Judge

Presented by:

/s/ Harry Auerbach
Harry Auerbach, OSB #82183
Senior Deputy City Attorney
Of Attorneys for Defendant
City of Portland
1221 SW Fourth Avenue, Room 430
Portland, OR 97204
Telephone: 503-823-4047

IN THE CIRCUIT COURT OF THE
STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

LINCOLN LOAN COMPANY, an Oregon corporation, Plaintiff, v. THE CITY OF PORTLAND, a municipal corporation, Defendant. and STATE OF OREGON, Intervenor.	Case No. 0307-07891 SUPPLEMENTAL JUDGMENT (Filed Apr. 28, 2004) (Entered May 5, 2004)

The court previously entered a General Judgment dismissing all claims asserted by plaintiff in this action. Based on the Cost Bill submitted by Intervenor State of Oregon (State), it is hereby ORDERED and ADJUDGED that judgment be entered in favor of the State and against plaintiff Lincoln Loan Company in the amount of $163, together with simple interest thereon at the statutory rate of nine percent per annum from the date of this judgment until paid.

Information Required by
ORCP 70A(2)(a) Money Award

Judgment creditors: State of Oregon
c/o Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301
(503) 378-6313

Judgment creditors' attorney:	Stephen K. Bushong Assistant Attorney General Oregon Department of Justice 1162 Court Street NE Salem, OR 97301 (503) 378-6313
Judgment debtor:	Lincoln Loan Company c/o Ridgway K. Foley, Jr. Greene & Markley PC 1515 SW 5th Ave Ste 600 Portland OR 97201
Others entitled to payment on judgment:	None
Amount of Judgment:	$163
Prejudgment Interest:	None
Interest on the Judgment:	Simple interest at the statutory rate of nine percent per annum, from the date of this judgment until paid
Costs and Disbursements:	This judgment awards costs and disbursements pursuant to ORS 20.140 and ORS 20.190(1)(b)(A)

DATED this 28 day of April, 2004

/s/ Linda L. Bergman
HONORABLE LINDA BERGMAN
Circuit Court Judge

Submitted by: Stephen K. Bushong
Assistant Attorney General
Of Attorneys for Intervenors

IN THE CIRCUIT COURT OF THE
STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

LINCOLN LOAN COMPANY, an Oregon corporation, Plaintiff, v. THE CITY OF PORTLAND, a municipal corporation, Defendant, and STATE OF OREGON, Intervenor.	Mult.Co. Case No. 0307-07891 **ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** (Filed Mar. 19, 2004) (Entered Apr. 5, 2004)

On January 21, 2004, this matter came before the court on cross-motions for summary judgment. The plaintiff was represented by Ridgway Foley, the City of Portland by Harry Auerbach, and the State of Oregon by Stephen Bushong. Thomas Christ filed an *amicus* brief.

In 1995, Lincoln Loan sued the City of Portland and won. The defendant then appealed and the Court of Appeals reversed and entered a judgment for defendant. The Oregon Supreme Court denied review, the US Supreme Court denied certiorari.

Plaintiff's motion for summary judgment argues that the Court of Appeals judgment is void because the Court of Appeals itself has no legal basis to exist. The argument is that the 1910 constitution amendment to Article VII which allowed the creation of the Court of Appeals was not validly approved by the people. Without that amendment

to Article VII, the Oregon Constitution does not provide for an intermediate appellate court. If that court falls, so does its judgment. Plaintiff's brief outlines its reasons for urging this court to find the amendment improperly approved.

Memoranda by defendant intervenor and amicus raise a number of issues, but the first one to be discussed is the statute of limitations. The residual provisions of ORS 12.140 clearly indicate that all actions have some statute of limitations. Whether this court thinks that the applicable statute of limitation is 2 years for a tort claim, or 10 years under the residual provisions, or some reasonable length of time, it must be less than 94 years. How else to order our lives? This court FINDS that the claim is filed beyond whatever statute of limitations covers this action.

This court also FINDS that plaintiff has no standing to bring an action based on the 1910 amendment on separate vote or full-text requirements. Plaintiff obviously is not a voter who was deprived of a chance to approve only those provisions with which he/she agreed. This plaintiff can not vindicate the rights of those voters. This plaintiff is seeking a way to invalidate a judgment of the Court of Appeals with which it disagrees. To invalidate the judgment, it must invalidate the court.

It is hereby ordered that plaintiff's motion for summary judgment is denied and defendant's motion for summary judgment is granted.

Mr. Auerbach shall prepare the general judgment.

DATED this 19 Day of March, 2004.

/s/ Linda L. Bergman
HON. LINDA L. BERGMAN
Circuit Court Judge

IN THE SUPREME COURT OF THE
STATE OF OREGON

LINCOLN LOAN COMPANY, Plaintiff-Appellant, v. THE CITY OF PORTLAND, a municipal corporation, Defendant-Respondent, and STATE OF OREGON, Intervenor-Respondent.	Multnomah County Circuit Court No. 0307-07891 SC S51666 **ORDER DENYING PETITION FOR RECONSIDERATION**

Upon consideration by the court.

The court has considered the petition for reconsideration and orders that it be denied.

Dated this 6th day of September 2006.

/s/ Wallace P. Carson, Jr.
WALLACE P. CARSON, JR.
PRESIDING JUSTICE

De Muniz, J., not participating

c: Ridgway K. Foley, Jr.
Harry M. Auerbach
Mary Hazel Williams
Thomas M. Christ